

UNITED STATES BANKRUPTCY COURT
DISTRICT OF RHODE ISLAND

IN RE: NEWPORT CREAMERY, INC.

BK No: 01- 13196

CHAPTER 7

Andrew Richardson, Trustee of the Newport Creamery, Inc.
Plaintiff/Appellee

Vs.

A.P. No. . 01-1118

Robert E. Swain,
Rocomi Enterprises, LLC
Newport Creamery, L.P.;
NewBerg, L.P.
NewHart, L.P., and
Tarpon Highlands Development Corporation,
A/k/a Tarpon Highlands Development Company, LLC.
Defendants

FILED OCT 01 '01 16:04 USBCRI

MOTION FOR LEAVE TO APPEAL

Now comes Defendants in the above-entitled matter, pursuant to 28 USC§158, Bankruptcy Rule 8003, and Move for leave to appeal the Interlocutory Judgment entered by this Court on Friday, September 21, 2001, on or about 6:00 p.m., as attached hereto as **Exhibit 1**.

1. Facts:

In this Adversary Proceeding filed on September 14, 2001, the Trustee, Andrew Richardson, has gained control over the property of the six defendants in order to sell it to an unidentified third party, who allegedly will buy the assets of the Debtor and the Defendants through a sale to be conducted by the U.S. Bankruptcy Court.

34

The Trustee claims he had an emergency need for the Defendants' properties because he does not have sufficient revenues to keep the Debtor's stores operating, and that if he cannot sell the assets of all parties promptly, together with those of the Debtor, the value of the Debtor's estate will be substantially diminished. Averments 43, 44, 45, and 46 of Trustee's Complaint.

The Trustee, Andrew Richardson, (Complaint, Averment 1) has complained that he seeks "to retrieve and retain assets of the Debtor that have been **fraudulently transferred** or converted by the defendants" because "...transfers of real estate, equipment, personal property and cash" to (sic) Newport Creamery, L.P, NewBerg LP, NewHart, and Tarpon Highlands Development Corporation "are fraudulent transfers and voidable by the U.S. Trustee, pursuant to 11 U.S.C. §§548(a)¹ and 549² and R.I.G.L. 6-16-1 et seq." (Complaint, Averment 45).

¹ **11 USCA § 548 . Fraudulent transfers and obligations:**

"The trustee may avoid any transfer of an interest of the Debtor in property, or any obligation incurred by the Debtor, that was made or incurred on or within **one year before the date of the filing of the petition**, if the Debtor voluntarily or involuntarily--

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the Debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; ****

Note that Defendant Newport Creamery, LP purchased its properties for more than their appraised on March 12k 1999, more than on year ago; that NewBerg, LP purchased its Massachusetts properties in January of 2000, more than a year prior to its filing; and NewHart, LP purchased its Bloomfield property from a third party in July of 2000. Defendants contend that there is no evidence of fraudulent conveyances involving those three defendants.

² 11 USC § 549. Postpetition transactions. (a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate--

(1) that occurs after the commencement of the case; and

(2)(A) that is authorized only under section 303(f) or 542(c) of this title; or

(B) that is not authorized under this title or by the court.

The Trustee claims that the Defendants fraudulent transfer of “essential assets of the Debtor” have damaged the Debtor in the amount of nine million dollars.” (Complaint, Averment 47).

On September 14, 2001, the Trustee’s Motion for a Temporary Restraining Order was granted.

On September 21, 2001, the Trustee’s Motion for a Preliminary Restraining Order was granted. See Exhibit 1, attached.

Defendants have appealed such Order.

2. Questions on Appeal:

- (i) Did the Court err in granting injunctive relief on matters which it would not otherwise have had authority to grant final relief, because the Defendants had not consented to having judgment entered on jury issues and on state claims?
- (ii) Did the Court have err by authorizing the Trustee to sell the property of the Defendants Newport Creamery, LP, NewBerg, LP, and NewHart, LP, when no judgment had been granted conveying such property to the Debtor, and when the Bankruptcy Court lacked jurisdiction to sell the assets of such defendants?
- (iii) Did the Court err by granting authority to the Trustee to control the property of the Defendants, without using the higher standard of evidence required for the grant of a mandatory injunction?
- (iv) Did the Court err in granting injunctive relief on matters which it would not otherwise have had authority to grant final relief because the Defendants had not consented to having judgment entered on jury issues and on state claims?
- (v) Since the Court, without an evidentiary hearing on the merits, without a jury trial, without discovery, without a final judgment, and without statutory authority to sell

Defendants' properties granted relief (which was in effect a condemnation process of the Defendants), were the Defendants' Constitutional Rights under the U.S. Constitution as secured by the provisions of 42 USC§ 1983 and by the State Constitution violated?

- (vi) Did the Court err in determining that there was sufficient evidence to support an evidentiary finding of a likelihood of success on the merits when Keith Lowery indicated that his findings themselves were "questionable"?
- (vii) Did the Court err by granting injunctive relief when there was an adequate remedy at law available since the Trustee was asking for damages against the Defendants?
- (viii) Since no testimony was presented on irreparable harm, did the Court err in granting injunctive relief?
- (ix) Did the Bankruptcy Court err when it found a probability of success on the merits of a fraudulent conveyance claim by:
 - Newberg, LP when the uncontradicted evidence demonstrated that its properties were purchased from third parties for cash; and when the purchase of said property occurred more than one year before the bankruptcy filing;
 - NewHart, LP when the uncontradicted evidence demonstrated that its properties were purchased from third parties for cash;
 - Newport Creamery, LP when the uncontradicted evidence demonstrated that its properties were purchased for more than their valuation with cash; when the uncontradicted evidence demonstrated that the independent auditor opined that there was sufficient operating cash to be an on-going entity after sale; and when the purchase of said property occurred more than one year before the bankruptcy filing;

- Tarpon Highlands Development Corporation when no evidence was presented to support such a claim;
 - Rocomi Enterprises, LLC, when no evidence was presented to support such a claim;
 - Robert E. Swain, when no evidence was presented to support such a claim;
- (x) Did the Court err in granting injunctive relief by considering evidence not in the transcripts or exhibits of the injunction hearings?
 - (xi) Did the Court err in refusing to consider the unopposed averments in the Defendants' exhibits and supporting documentation?
 - (xii) Were the Court's evidentiary findings improperly influenced by appeals to passion and emotion?
 - (xiii) Since non core issues were involved, should the Court have made findings of fact and law?
 - (xiv) Did the Court err in not allowing the Defendants to present proposed findings of fact and law?
 - (xv) Did the so called alleged "emergency" need to sell third party property, justify the Court terminating Defendants' discovery rights?

3. Reasons for Appeal Should be Granted:

The Appeal should be granted since each of the questions presented will be answered in the affirmative by the U.S. District Court.

There is neither law nor fact which support the findings of Court in its Decision and Order of September 21, 2001.

The Defendants incorporate by reference its attached Memorandum of Law as a basis for the reasons why this Appeal would be approved.

Defendants
By Their Counsel



Keven A. McKenna, #662

Keven A. McKenna, P.C.

Attorneys at Law

23 Acorn Street

Providence, RI 02903

(401) 273-8200 Tel.

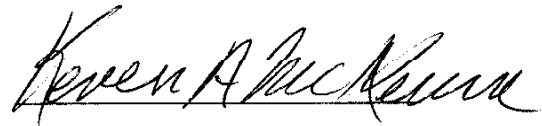
(401) 521-5820 Fax.

KevenM@McKennalaw.cc

CERTIFICATION

OCT

I hereby certify that on the 1st day of ~~September~~ 2001, I caused a copy of this Motion for leave to appeal to be served and mailed to Andrew Richardson, Trustee, and to his counsel, Boyajian, Harrington, and Richardson, 192 Waterman Street, Providence, Rhode Island 02903, and mailed to John Fitzgerald, Assistant U.S. Trustee, Office of U.S. Trustee, 11th Floor, Thomas P. O'Neil Building, 11 Causeway Street, Boston, Massachusetts, and mailed to the Clerk of U.S. Bankruptcy Court, Susan Thurston, 380 Westminster Street, Providence, R.I. 02903.



01-1118

EXHIBIT 11

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF RHODE ISLAND

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In re:	:	
NEWPORT CREAMERY, INC.	:	BK No. 01-13196
Debtor	:	Chapter 7
ANDREW S. RICHARDSON, TRUSTEE OF	:	
THE NEWPORT CREAMERY, INC.	:	
Plaintiff	:	
v.	:	A.P. No. 01-1118
ROBERT E. SWAIN,	:	
ROCOMI ENTERPRISES, LLC,	:	
NEWPORT CREAMERY, L.P.,	:	
NEWBERG, L.P.,	:	
NEWHART, L.P., and	:	
TARPON HIGHLANDS DEVELOPMENT	:	
CORPORATION	:	
Defendants	:	

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**ORDER GRANTING REQUEST FOR PRELIMINARY INJUNCTION AND GRANTING,
IN PART, TRUSTEE'S EMERGENCY MOTION FOR ADMINISTRATIVE ORDERS**

A continued hearing was held on September 18, 2001, on the Trustee's requests for a preliminary injunction and other emergency relief. On September 14, 2001, the Trustee's request for a temporary restraining order was granted, preventing the Defendants from transferring, encumbering, selling, or assigning any asset of any value including, but not limited to, cash or funds on deposit, without the prior approval of the Chapter 7 Trustee.

At the hearing, the Trustee offered the following evidence, which is uncontroverted and which is accepted as fact. Keith Lowey, CPA, reviewed the financial records of the Debtor and determined that

financial records were unavailable, without explanation. Among the missing records were original source documents including bank statements and leases. Based upon the records that were available, Lowey uncovered more than 160 "questionable" transactions, totaling over \$4,000,000. These entries represented cash out from the Debtor to Robert Swain and his wife Linda or other entities controlled by Swain, with no evidence of consideration passing to the Debtor on account of these payments. Lowey also determined, based on the Debtor's audited financial statements dated a few weeks after the purchase of Newport Creamery by Swain in late March of 1999, that the company carried \$1.8 million in unsecured trade debt and tax obligations-- not unusual for a business the size of Newport Creamery, Inc. According to the Debtor's schedules, however, the Debtor's unsecured debt had escalated to over \$8 million as of the date of the petition.

Lowey's investigation also revealed that in April of 2001, the ice cream manufacturing plant and related equipment and real estate were apparently transferred by Swain to a new company-- Newport Creamery Food Services, that this new company had no checking account until August 10, 2001, and that in addition to paying inflated prices for product from Newport Creamery Food Services, the Debtor paid the majority of the operating expenses of this new entity which is also controlled by Swain. In the period June 25, 2001, through August 31,

2001, \$750,953 was paid by the Debtor to or for the benefit of Newport Creamery Food Services. Included in this number is \$271,661 for product purchased by the Debtor, at least some of which was priced above market.

The trustee also called Peter Scotti, a real estate appraiser who analyzed five restaurant locations, formerly owned by the Creamery, but conveyed by Swain to another Swain entity, Newport Creamery, L.P., which were then leased back to the Debtor. Scotti compared those properties with restaurant locations rented by the Debtor from unrelated third parties and found that the Debtor paid significantly higher rent per square foot in the five stores leased to the Debtor by Swain and/or his related entities. Scotti also found when he compared the rent as a percent of annual revenue per store, that the five Swain stores were in the range of 10.1% to 14.5 %, whereas unrelated stores were in the range of 3.3 % to 8.6%. This evidence strongly supports the accusation that Swain and his related entities were using Newport Creamery as a personal cash cornucopia, until it was no longer able to support such abuse.

The only response by the Defendants is in the affidavits of Robert Swain, who failed to appear and was not made available for cross examination. All of Swain's affidavits contain unsupported conclusory statements which are given no weight.

Courts in this circuit dealing with preliminary injunction

issues use a four-part test that takes into account (1) the movant's likelihood of success on the merits, (2) the potential for irreparable injury, (3) a balancing of the relevant equities, and (4) the effect on the public interest. See *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 5 (1st Cir. 1991); *Aoude v. Mobil Oil Corp.*, 862 F.2d 890, 892 (1st Cir. 1988). "The heart of the matter is whether 'the harm caused plaintiff without the injunction, in light of the plaintiff's likelihood of eventual success on the merits, outweighs the harm the injunction will cause defendants.' " *United Steelworkers of America v. Textron, Inc.*, 836 F.2d 6, 7 (1st Cir. 1987) (quoting *Vargas-Figueroa v. Saldana*, 826 F.2d 160, 162 (1st Cir. 1987)).

The Trustee and his professionals had been in place one week prior to the instant hearing, and in that short time they uncovered a disturbing amount of information establishing a consistent pattern on the part of the Swains and their related entities of draining cash from the Debtor, causing the unsecured debt of the company to go from \$1.8 million to over \$8 million in approximately two years- leaving the Debtor in critical financial condition. These activities commenced almost as soon as the ink was dry on the closing documents in March 1999, and continued even post-petition, until new management was put in place. Accordingly, I find that the trustee has clearly met his burden of establishing the likelihood of success on the

merits.

The potential for irreparable injury to the estate, without a preliminary injunction in place, is high. Swain has demonstrated a propensity to move large sums of cash out of the Debtor even during this bankruptcy proceeding. Without an injunction to preserve whatever is left, and based on Swain's track record until now, any unprotected assets that are subject to this litigation will probably evaporate.

In balancing the relative equities, I must look at "the hardship to the nonmovant if the restrainer issues as contrasted with the hardship to the movant if interim relief is withheld." *Narragansett Indian Tribe*, 934 F.2d at 5. In the balance, Swain has offered no evidence of potential harm to him and/or his entities by a preliminary injunction, and he and his related entities have had the benefit of over \$4,000,000 transferred from the Creamery since he took over. In maintaining the status quo, The Trustee's ability to obtain a return of liquid and easily transferred assets will be maintained, and the balancing of equities clearly favors the injunction.

Aside from the public's interest in seeing that bankruptcy laws aimed at recovering fraudulent transfers and distributing assets for the benefit of creditors are enforced, the public interest is not affected by this decision. See *O'Donnell v. Royal Business Group*.

Inc. (*In re Oxford Homes, Inc.*), 180 B.R. 1, 14 (Bankr. D. Me. 1995).

For the foregoing reasons, and based on the entire record in this case during its pendency here and in Florida, the Trustee's request for a preliminary injunction is granted, and it is ORDERED that the Defendants: Robert E. Swain, Racomi Enterprises, LLC, Newport Creamery, L.P., Newberg, L.P., Newhart, L.P. and Tarpon Highlands Development Corporation, their agents, officers, employees, successors and assigns are enjoined and restrained from transferring, encumbering, selling, or assigning any asset of any value including but not limited to cash or funds on deposit, without the prior approval of the Chapter 7 Trustee, until either a subsequent order is entered modifying or amending this order or until the Complaint is heard and determined, whichever occurs sooner. If the Defendants feel that the Trustee is unreasonably withholding his consent to any transfer prohibited by this order, they may seek approval from this Court for such transfer or expenditure.

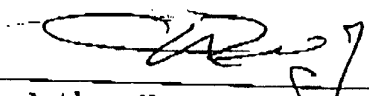
Additionally, based upon the evidence, the Trustee's request for emergency relief is granted in part, i.e. the Trustee is authorized to market and offer for sale the assets of Newport Creamery, L.P. and all assets transferred to Newport Creamery Food Services after April, 2001, as a package sale of the assets within the Debtor's estate.¹

¹ The Trustee has waived his request to include the assets of Newhart, L.P. and Newberg, L.P. as part of his marketing efforts,

Within twenty-four hours of receipt of any offer from a bona fide purchaser, the Trustee shall communicate the terms of the offer in writing to any secured party having an interest in the assets being sold, and to the Defendants herein. If the Trustee proposes to sell the assets, he should file a motion pursuant to 11 U.S.C. § 363, whereupon all interested parties will be given the opportunity to object and be heard.

Finally, the Debtor has filed an Emergency Motion for Expedited discovery, an Emergency Motion for Accounting Records, and an Emergency Motion to Compel Production of Documents. The Trustee is ORDERED to file responses to those motions on or before Tuesday September 25, 2001, and a hearing will be held on Thursday September 27, 2001, at 9:30 a.m. on these pleadings. Additionally, the parties are ordered to file a discovery plan pursuant to Fed. R. Civ. P. 26(f) on or before Tuesday, September 25, 2001. A pre-trial conference in the above captioned adversary proceeding is scheduled for Thursday, September 27, 2001 at 9:30 a.m.

Dated at Providence, Rhode Island, this 21st day of September, 2001.


Arthur N. Votolato
U.S. Bankruptcy Judge

because he intends to close the restaurants at those locations.

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Entered on docket
Date: 9/21/01

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF RHODE ISLAND

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In re:	:	
NEWPORT CREAMERY, INC.	:	BK No. 01-13196
Debtor	:	Chapter 7
ANDREW S. RICHARDSON, TRUSTEE OF	:	
THE NEWPORT CREAMERY, INC.	:	
Plaintiff	:	
v.	:	A.P. No. 01-1120
LINDA D. SWAIN,	:	
Defendant	:	

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TEMPORARY RESTRAINING ORDER

After hearing¹ on September 21, 2001 and upon reviewing the Complaint, the motion for temporary restraining order, the accompanying memorandum, and the deposition of Linda D. Swain, I find that immediate and irreparable injury, loss or damage will likely be caused to this estate and its creditors before a hearing on the merits can be held, and that it is crucial to maintain the status quo until that time. See Fed R. Civ. P. 65(b).² The Trustee and the Court made many attempts to provide notice of this hearing to the Defendant, including notifying her former attorney

¹ The hearing was held telephonically for the convenience of the Defendant, who is reportedly in Florida, but she failed to appear.

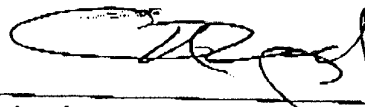
² This rule is incorporated into bankruptcy by Fed. R. Bankr. P. 7065.

Domenic L. Massari, III, Esq., her husband's attorney, Kevin McKenna, Esq., and by leaving messages at her home telephone number.

Based upon the entire record in this case, it is ORDERED that the Defendant Linda D. Swain, her agents and others acting on her behalf or under her direction and control are temporarily, but immediately, enjoined and restrained from transferring, selling, assigning, encumbering, pledging, or donating any asset of any value, including but not limited to cash or funds on deposit, and any interest she may have in real estate located at 1055 Bay Esplanade, Clearwater, Florida or any proceeds in which she may have an interest from the sale or financing of that property, without the prior approval of the Chapter 7 Trustee, or until authorized by the Court.

A hearing on the Trustee's request for a preliminary injunction, including the continuance of the relief granted herein will be held on Thursday, September 27, 2001, at 10:30 a.m. at the United States Bankruptcy Court for the District of Rhode Island.

Dated at Providence, Rhode Island, this 21st day of September, 2001, at 5:30 p.m.


Arthur N. Votolato
U.S. Bankruptcy Judge

Entered on docket
Date: 9/21/01